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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

In re NICHOLAS Z., a Person Coming
Under the Juvenile Court Law.

SAN DIEGO COUNTY HEALTH AND
HUMAN SERVICES AGENCY,

Plaintiff and Respondent,

v.

GABRIEL Z. et al.,

Defendants and Appellants.

D053883

(Super. Ct. No. J516545A)

APPEAL from an order of the Superior Court of San Diego County, James A.
Lauer, Jr., Juvenile Court Referee. Affirmed.

Gabriel Z. and Candace H. appeal from an order terminating parental rights to
their child, Nicholas Z., under Welfare and Institutions Code section 366.26.¹ We affirm
the order.

¹ Further statutory references are to the Welfare and Institutions Code.

STATUTORY AND PROCEDURAL BACKGROUND

Gabriel and Candace are the unmarried parents of Nicholas, born June 2004. In January 2007, the San Diego County Health and Human Services Agency (Agency) detained Nicholas and filed a petition under section 300, subdivision (b), alleging that Gabriel and Candace used methamphetamine and were unable to properly care for their son.

In May 2007, the court sustained the petition and ordered each parent to participate in the Substance Abuse Recovery Management System (SARMS) program. The court granted Gabriel unsupervised visitation with Nicholas, and ordered supervised visitation for Candace, who had refused to participate in services.

At the August 2007 dispositional hearing, the court found that returning Nicholas to Gabriel's care would be detrimental because Gabriel did not have appropriate housing and was unable to provide full-time care for his son. The court removed Nicholas from parental custody, continued his placement with relatives, and ordered a plan of family reunification services. The court expanded Gabriel's visitation to one overnight visit per week.

Gabriel went "on a binge" during several weeks in October 2007 and did not consistently visit Nicholas. The court found Gabriel in contempt for not attending the SARMS program. Gabriel told the social worker that he had used drugs for 13 years and could not "just stop." He was arrested on Christmas Day for possession of a controlled substance and other drug charges and released on December 28. Later that day, Gabriel was in a car accident, and he was arrested for driving under the influence. Nicholas's

relatives reported that during this period, after overnight visitation with Gabriel, Nicholas was extremely hyper, dirty, and would not listen to them. The paternal uncle expressed great concern for Nicholas's well-being during visits because of Gabriel's unpredictable behavior.

The court imposed supervision requirements on Gabriel's visitation with Nicholas. The paternal aunt stated that after supervised visits with Gabriel, Nicholas became emotionally unstable, had problems sleeping, and awoke from his naps crying. At the six-month status review hearing, the court terminated reunification services and set a section 366.26 hearing to select and implement a permanency plan for Nicholas.

At the section 366.26 hearing, the court admitted in evidence the Agency's reports of July 30, 2008 (initial report), and October 9 (addendum report), and heard testimony from the social worker, Gabriel, and Candace.

In its initial report, the Agency reported that Nicholas was a lively, energetic boy who was affectionate and loving with his many relatives. He was doing well in preschool, both socially and scholastically. Nicholas had lived with his paternal uncle and aunt from January to April 2007. The Agency then provisionally placed Nicholas with his maternal great-aunt, to whom he was very closely bonded. Nicholas referred to his great-aunt as "Mommy" and identified her home as his home.² In October, the Agency denied the great-aunt's home study, and returned Nicholas to his uncle and aunt's

² The great-aunt often cared for Nicholas prior to the dependency proceedings. She was also the guardian of one of Nicholas's half siblings.

home during the pendency of the great-aunt's administrative appeal. The great-aunt continued to care for Nicholas during the work week. Nicholas's paternal uncle and aunt were safe, loving, and reliable caregivers. Both the great-aunt and the paternal uncle and aunt were willing to adopt Nicholas.

Candace's visits with Nicholas were inconsistent, and she rarely telephoned him. Gabriel regularly visited Nicholas until December 2007. From December to March 2008, Gabriel's visits with Nicholas were sporadic. After March, Gabriel typically joined his brother's family and Nicholas on weekends for family outings.

The social worker reported that Nicholas knew his father and had a relationship with him. Nicholas was disappointed when Gabriel missed a visit. The social worker opined that termination of parental rights would not be detrimental to Nicholas. Nicholas had not been able to depend on either parent.

In the addendum report, the social worker stated that Nicholas continued to visit his father on a fairly regular basis, supervised by his uncle. The social worker supervised one visit. She reported that Nicholas and Gabriel enjoyed spending time together, and Nicholas talked nonstop to his father about animals and superheroes. Nicholas was not upset when the visit ended. On the ride home, Nicholas told the social worker that he loved his father and wanted to live with him.

Gabriel completed a drug rehabilitation program in August 2008. In September, he was arrested for driving under the influence (DUI).

The social worker opined that while there were positive aspects to Gabriel's relationship with Nicholas, Gabriel had not seriously addressed concerns about his long-standing use of drugs and alcohol, and was not able to safely parent Nicholas.

The social worker testified that Nicholas referred to Gabriel as "Daddy." Gabriel acted as a parent in that he answered Nicholas's questions, pushed him on the swing, and helped him climb on play equipment and get into the car. Gabriel was very patient with Nicholas. They were affectionate with each other.

Gabriel testified that his other visits with Nicholas were similar to the one visit described by the social worker. He visited his son as often as he was allowed. Gabriel believed it would be detrimental to Nicholas to break the bond they shared. Nicholas asked to go home with Gabriel and sometimes became upset and cried when Gabriel left.

Candace testified that during visits, she played with Nicholas and often fed him. She was clean and sober, and she loved her son.

The court found by clear and convincing evidence that Nicholas was adoptable. With respect to Candace, the court found that she had not consistently and regularly visited or contacted Nicholas. The court found that Gabriel regularly visited his son, and stated that the issue was therefore whether the benefit to Nicholas of maintaining the parent-child relationship outweighed the benefit of a stable, permanent home. The court found that there was no showing that Nicholas would be greatly harmed if parental rights were terminated and, therefore, the beneficial parent-child relationship exception did not apply. The court terminated parental rights.

DISCUSSION

A

The Parties' Contentions

Gabriel contends that at trial, he proved the applicability of the exception to termination of parental rights under section 366.26, subdivision (c)(1)(B)(i) (beneficial parent-child relationship exception). He asserts that the evidence showed that he occupied a parental role in Nicholas's life, resulting in Nicholas's significant, positive, emotional attachment to him, and that severing the parent-child relationship would greatly harm Nicholas. Gabriel argues that his circumstances are analogous to the parent in *In re S.B.* (2008) 164 Cal.App.4th 289, 299 (*S.B.*), in which this court reversed the order terminating parental rights.

Candace implicitly concedes that the court correctly determined that the beneficial relationship exception did not apply to her relationship with Nicholas. Candace asserts that in the event the judgment terminating Gabriel's parental rights is reversed, her parental rights must be reinstated under California Rules of Court, rule 5.725(a)(2).

The Agency contends that there is substantial evidence to support the court's finding that the beneficial parent-child relationship exception did not apply. The Agency argues that Gabriel's relationship with Nicholas was not parental in nature, Nicholas did not have a substantial, positive, emotional attachment to his father, and the benefits of adoption greatly outweighed any possible detriment from severing the parent-child relationship.

Minor's counsel joins with the Agency's arguments and further asserts that adoption would serve Nicholas's best interests.

B

Legal Framework for Application of the Beneficial Parent-Child Relationship Exception and Standard of Review

At a permanency plan hearing under section 366.26, the court may order one of three alternatives: adoption, guardianship, or long-term foster care. (*In re Taya C.* (1991) 2 Cal.App.4th 1, 7.) If the dependent child is adoptable, there is a strong preference for adoption over alternative permanency plans. (*San Diego County Dept. of Social Services v. Superior Court* (1996) 13 Cal.4th 882, 888; *In re Zachary G.* (1999) 77 Cal.App.4th 799, 808-809.)

Once the court determines that the child is likely to be adopted, the burden shifts to the parent to show that termination of parental rights would be detrimental to the child under one of the exceptions listed in section 366.26, subdivision (c)(1). (*In re Lorenzo C.* (1997) 54 Cal.App.4th 1330, 1343-1345; but see § 366.26, subd. (c)(1)(A).) Section 366.26, subdivision (c)(1)(B)(i), provides an exception to termination of parental rights when "[t]he parents have maintained regular visitation and contact with the child and the child would benefit from continuing the relationship."

"Benefit from continuing the relationship" means that "the [parent-child] relationship promotes the well-being of the child to such a degree as to outweigh the well-being the child would gain in a permanent home with new, adoptive parents." (*In re Autumn H.* (1994) 27 Cal.App.4th 567, 575 (*Autumn H.*) Where the parent has continued

to regularly visit and contact the child, and the child has maintained or developed a significant, positive, emotional attachment to the parent, then "the court balances the strength and quality of the natural parent/child relationship in a tenuous placement against the security and the sense of belonging a new family would confer. If severing the natural parent/child relationship would deprive the child of a substantial, positive emotional attachment such that the child would be greatly harmed, the preference for adoption is overcome and the natural parent's rights are not terminated." (*Ibid.*)

"Neither section 366.26, subdivision (c)(1)(B)(i), nor *Autumn H.* requires proof that the child has a 'primary attachment' to a parent or that the noncustodial parent has maintained day-to-day contact with the child." (*S.B., supra*, 164 Cal.App.4th at p. 300, citing *Autumn H., supra*, 27 Cal.App.4th at p. 575 and *In re Casey D.* (1999) 70 Cal.App.4th 38, 51.)

We determine whether there is substantial evidence to support the court's ruling by reviewing the evidence most favorably to the prevailing party and indulging in all legitimate and reasonable inferences to uphold the court's ruling. (*In re Misako R.* (1991) 2 Cal.App.4th 538, 545.) If there is substantial evidence supporting the court's ruling, the reviewing court must affirm the court's rejection of the exceptions to termination of parental rights under section 366.26, subdivision (c). (*Autumn H., supra*, 27 Cal.App.4th at p. 576; *S.B., supra*, 164 Cal.App.4th at p. 298.)

C

There Is Substantial Evidence to Support the Court's Finding That the Beneficial Parent-Child Relationship Exception Did Not Apply

The trial court found that to the extent the parent-child relationship between Gabriel and Nicholas was parental in nature and beneficial to Nicholas, there was no evidence to support a finding that Nicholas would suffer great harm if parental rights were terminated. There is substantial evidence to support the court's finding.

We acknowledge, as did the trial court, that the record shows that Nicholas recognized Gabriel as his "Daddy" and that when Gabriel was stable, Nicholas derived some benefit from their affectionate interactions. However, throughout the dependency proceedings, Gabriel continued to use drugs and alcohol, he did not comply with his case plan requirements, and he did not focus on Nicholas's well-being. Gabriel did not begin to participate in reunification services until November 2007, 10 months after the Agency detained Nicholas in protective custody. Gabriel's instability negatively impacted Nicholas, whose behaviors regressed after visitation. Nicholas became emotionally unstable and "f[ell] apart every time" he interacted with his father.

The circumstances here are not comparable to those in *S.B.* In that case, the parent demonstrated throughout the dependency proceedings that his daughter's well-being was his primary concern. The evidence showed, and the court found, that the father and daughter had an emotionally significant and loving relationship. (*S.B.*, *supra*, 164 Cal.App.4th at pp. 296, 298.) The father consistently visited his daughter, fully

complied with his case plan, maintained his sobriety after a lengthy history of substance abuse, decided that his daughter's interests were better served by remaining with her grandmother rather than returning to his care, and sought additional services on his own after court-ordered services were terminated. His relationship to his daughter was parental in nature, and she derived comfort, affection, love, and guidance from their relationship. Under those circumstances, the *S.B.* court determined that the child would be greatly harmed by the loss of the parent-child relationship. (*Id.* at pp. 300-301.)

Here, in contrast, there is substantial evidence supporting the court's findings that Nicholas would not be greatly harmed by termination of parental rights and that, to the extent Nicholas might experience some sense of loss, Nicholas's interests in adoption outweighed his interests in maintaining the parent-child relationship. The record shows that Nicholas had a deep, well-established bond with his great-aunt. He viewed her as a parent and considered her home to be his home. Nicholas relied on his caregiver relatives to meet all of his emotional and physical needs. His more positive interactions with his father did not occur until after the reunification period had ended, and took place during structured family outings in which his uncle and aunt were also present.

The record also shows that Gabriel's instability during the dependency proceedings was detrimental to Nicholas's well-being. Gabriel did not resolve his substance abuse problems. (See § 300.2 [parental substance abuse is presumed to be contrary to the well-being of the child].) During the reunification period, Gabriel chose to "live an inappropriate lifestyle to care for his son" and subjected Nicholas to instability, broken promises, and emotional turmoil. Shortly before the section 366.26 hearing and less than

three weeks after he completed a recovery program, Gabriel was arrested on DUI charges.

The court may properly consider a parent's past actions in determining whether future contact would be beneficial to the child. As our Supreme Court has explained, " 'a measure of a parent's future potential is undoubtedly revealed in the parent's past behavior with the child.' " (*In re Jasmon O.* (1994) 8 Cal.4th 398, 424, quoting *In re Laura F.* (1983) 33 Cal.3d 826, 833.) Here, the court correctly determined that Nicholas's interests in a continued relationship with his father did not outweigh Nicholas's interests in the security of an adoptive placement with a safe, stable, loving, and reliable family. (*Autumn H.*, *supra*, 27 Cal.App.4th at p. 575.)

DISPOSITION

The order is affirmed.

AARON, J.

WE CONCUR:

NARES, Acting P. J.

HALLER, J.